

Honorable Timothy W. Dore
Hearing date: August 25, 2023; 9:30 a.m.
Hearing Place: Room 8106, 700 Stewart Street, Seattle, WA 98101
Responses due by: August 18, 2023

IN THE UNITED STATES BANKRUPTCY COURT FOR THE
WESTERN DISTRICT OF WASHINGTON AT SEATTLE

In re:)	Chapter 7
)	Bankruptcy No. 22-10566-TWD
ALICE LYNN HANIFY,)	
a/k/a Alice Lynn Fallon,)	TRUSTEE'S MOTION FOR AN ORDER
)	DIRECTING ATTORNEYS TO TURN
Debtor(s).)	OVER FILES

COMES NOW the duly appointed trustee, Ronald G. Brown ("the Trustee"), through counsel, The Livesey Law Firm, and Rory C. Livesey, and moves this Court for an order directing the law firms of Kobes Legal PLLC, and Brett Kobes, and Dean Standish Perkins and Associates, and Dean Perkins (collectively "the Attorneys"), to turn over all attorney files and records related to the Debtor's lawsuit filed in King County Superior Court under Cause No. 21-2-13712-8, including, but not limited to, correspondence and electronic communication, with and on behalf of the Debtor regarding the lawsuit.

I. BACKGROUND

The Debtor filed a Chapter 13 petition on April 6, 2022. The case converted to a Chapter 7 proceeding on June 12, 2022. Prior to the filing of her petition, on October 14, 2021, the Debtor filed a complaint in King County Superior Court against My L. Thai and Spouse Do Thai, as the parents of Nhi-Lac Alex Thai ("the Defendants"), for injuries received in an automobile accident. The Debtor employed the Attorneys to represent her in that matter. The claim became an asset of the bankruptcy estate upon the filing of the petition. 11 U.S.C. § 541. When the case converted to

1 a Chapter 7 the Trustee employed the Attorneys as special counsel under 11 U.S.C. § 327(e) to
2 pursue the personal injury action on behalf of the estate. The Attorneys wish to withdraw as special
3 counsel. They have withdrawn from the King County case, and likely will have withdrawn as
4 special counsel prior to the hearing on this matter. The Trustee has entered into a tentative
5 settlement agreement with the Defendants' insurance company. That settlement is awaiting Court
6 approval, which is expected to take place on the same date as the hearing on this matter. If the
7 settlement is approved, this motion may become moot. However, should the settlement not be
8 approved or should an order approving the settlement be appealed, the Trustee will need the
9 Attorneys' files to continue pursuing this claim on behalf of the estate.

10 II. ARGUMENT

11 A. Turnover of Debtor Files

12 The Trustee is requesting the Court enter an order directing the Attorneys to turn over to the
13 Trustee all files and records in their possession related to the Debtor's personal injury action. The
14 Trustee is requesting the order include not only pleadings and correspondence, but also Attorneys'
15 notes and communications between the Attorneys and the Debtor. The Trustee is making this
16 request pursuant to 11 U.S.C. § 542(e), which states as follows:

- 17 (e) Subject to any applicable privilege, after notice and a hearing,
18 the court may order an attorney, accountant, or other person
19 that holds recorded information, including books, documents,
20 records, and papers, relating to the debtor's property or
21 financial affairs, to turn over or disclose such recorded
22 information to the trustee.

23 11 U.S.C. § 542(e).

24 The files held by the Attorneys are property of the Chapter 7 bankruptcy estate.
25 11 U.S.C. § 541. Generally property of the estate held by a third party is required to be turned over
to the trustee. 11 U.S.C. § 542(a). The Attorneys were working for the Debtor on a contingency
fee basis. It is unlikely they are owed any money by the Debtor. Moreover, as part of the
stipulation to withdraw, they have agreed to waive their fees and costs. However, if they are owed
money, they could assert a lien on the Debtor's files in their possession pursuant to RCW 60.40, *et*.

1 *seq.* Section 542(e) authorizes turnover of property of the estate that may be subject to a possessory
2 lien by an accountant or an attorney. Congress’s purpose for adding Section 542(e) was “to restrict
3 . . . the ability of accountants and attorneys to withhold information from the trustee” and thus
4 eliminate their leverage under the state law lien provision to command payment before other
5 creditors by withholding information needed to administer the estate. *In re Foster*, 188 F. 3d 1259,
6 1265 (10th Cir. 1999).

7 **B. Attorney/Client Privilege**

8 The first sentence of Section 542(e) will raise an obvious issue. The section starts out with
9 “Subject to any applicable privilege . . .”. Initially, it must not be forgotten that the files the Trustee
10 seeks are property of the bankruptcy estate and the turnover of the property itself to the Trustee does
11 not implicate the attorney/client privilege. It is clear that in the case of a corporate debtor, the
12 attorney/client privilege runs to the trustee, and it is the trustee’s to waive. *Commodity Futures*
13 *Trading Commission v. Weintraub*, 471 U.S. 343, 105 S.Ct. 1986, 85 L.Ed 2d 372 (1985). (*See,*
14 *also, United States v. Campbell*, 73 F.3d 44 (5th Cir. 1996). Whether the privilege runs to the trustee
15 in the case of an individual debtor seems to be something of an open question, with decisions all
16 over the board. There are cases that find the trustee does not have the power to waive the
17 attorney/client privilege for an individual. *In re Silvio De Lindegg Ocean Developments of America,*
18 *Inc.*, 27 B.R. 28 (Bkrtcy. S.D. Fla. 1982). *See, also, In re Hunt*, 153 B.R. 445, 454 (Bkrtcy. N.D.
19 Tex. 1992). However, other courts have reached the opposite conclusion, finding the trustee may
20 waive the privilege of an individual debtor. Those cases focus on the lack of adverse effect on the
21 debtor based upon the facts of the case. *In re Smith*, 24 B.R. 3 (Bkrtcy. S.D. Fla. 1982) (with facts
22 similar to this case, but involving a wrongful death suit.) *See, also, In re Fairbanks*, 135 B.R. 717
23 (Bkrtcy. D. N.H. 1991).

24 There is a third, and more reasoned, approach to this issue that balances the potential harm
25 to the Debtor against the Trustee’s need for information to fulfill his duties under the Bankruptcy
Code. *See* 11 U.S.C. § 704. *In re Foster*, 188 F. 3d at 1265. *See, also, In re Bazemore*, 216 B.R.

1 1020 (Bkrtcy S.D. Ga 1998) and *In re Miller*, 247 B.R. 704 (Bkrtcy. N.D. Ohio 2000). This
2 practical approach would allow for the turnover of privileged communications to the Trustee if the
3 benefit to the estate outweighs any prejudice to the Debtor.

4 The policies supporting a finding that the trustee controls the privilege in individual
5 bankruptcies exists in this case. Generally, the files the Trustee is seeking would be little more than
6 what the Debtor would have to produce in discovery in any personal injury action. The Trustee is,
7 however, requesting the communication between the Debtor and the Attorneys. That information
8 is important in maximizing the estate for the benefit of the creditors. The Debtor will suffer no
9 repercussions if the files are turned over to the Trustee. Moreover, the Trustee is not necessarily
10 looking to disclose any otherwise privileged communications to third parties. Admittedly, there may
11 be a set of circumstances that may require disclosure, but generally the Trustee is seeking to step
12 into the shoes of the Debtor as the Plaintiff to obtain the best recovery for the benefit of the
13 creditors.

14 C. An Adversary Proceeding is Unnecessary

15 Typically a turnover of property held by a third party requires an adversary proceeding. Fed.
16 R. Bank. P. 7001. However, that rule excludes turnover actions under Section 542. (See Fed. R.
17 Bank. P. 6002.) Moreover, Section 542(e) says “. . . after notice and a hearing . . .” the Court may
18 order the turnover. The Bankruptcy Code defines “after notice and a hearing” as “. . . such notice
19 as is appropriate in the particular circumstances, and such opportunity for a hearing as is appropriate
20 in the particular circumstances . . .” 11 U.S.C. § 102(1). If an adversary proceeding is required,
21 the Trustee’s investigation into the asset would be delayed by months. Under the circumstances the
22 notice and hearing requirements of the statute are met by a motion.

23 D. Attorney’s Liens

24 Should the Attorneys claim a lien under state law, it is possible to provide the Attorneys with
25 a replacement lien or administrative claim. The difficulty then becomes in valuing the lien or the
administrative claim. The majority of courts that have considered the issue concluded that an

1 attorney who turns over documents to a trustee, as required under Section 542(e), “may be entitled
2 to a replacement lien or administrative expense measured by the value of the documents provided,
3 if any, in revealing assets or assisting the administration of the estate.” *In re Rapid Freight System*,
4 2011 Bankr. LEXIS 1328 (New Jersey 2011). Typically such motions are not directed at trustee’s
5 special counsel. At this point it is virtually impossible to determine the value of any replacement
6 lien or administrative claim until the files are turned over to the Trustee and an analysis of their
7 ultimate benefit of the estate can be conducted. The Trustee requests that the replacement of the
8 Attorneys’ liens or the allowance of an administrative claim, if either are applicable, be subject to
9 further order of the Court.

10 III. CONCLUSION

11 The Trustee will soon be operating without special counsel in the personal injury action. The
12 Attorneys are the ones most familiar with the case and have accumulated files and records that are
13 necessary for the Trustee to realize on this asset. The personal injury action is an asset of the
14 bankruptcy estate. There is a tentative agreement awaiting approval by the Court. However, should
15 that settlement fall through, the Trustee will be decidedly disadvantaged without access to the
16 records needed to pursue that claim.

17 WHEREFORE, based on the foregoing, the Trustee requests that the Court enter an order
18 directing the Attorneys to turn over all files of the Debtor in their possession, including pleadings,
19 notes, client communications (both electronic and written), to the Trustee.

20 RESPECTFULLY SUBMITTED this 4th day of August, 2023.

21 THE LIVESEY LAW FIRM

22 /S/ Rory C. Livesey

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24 Rory C. Livesey, WSBA #17601
25 Attorney for Ronald G. Brown, Trustee